Canada Industrial Relations Board Conseil canadien des relations industrielles

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Reasons for decision

Council of ILA Locals for the Port of Halifax,

applicant,

and

Barrington Terminals Limited,

respondent.

Board File: 28536-C
Neutral Citation: 2011 CIRB 612
November 4, 2011

The Canada Industrial Relations Board (the Board) was composed of Ms. Elizabeth MacPherson, Chairperson, and Messrs. Daniel Charbonneau and André Lecavalier, Members. A hearing was held on October 3 and 4, 2011, at Halifax, Nova Scotia.

Appearances

Ms. Rebecca K. Saturley, for Barrington Terminals Limited;
Mr. Ronald A. Pink, Q.C., for the Council of ILA Locals for the Port of Halifax.

I–Background

[1] In February 2003, the Board certified the Council of ILA Locals for the Port of Halifax (the ILA Council or the applicant) as the bargaining agent for all employees of employers engaged

in longshoring in the geographic area of the Port of Halifax, pursuant to sections 32 and 34 of the *Canada Labour Code* (*Part I–Industrial Relations*) (the *Code*) (see Board order no. 8408-U). In June 2004, the Board amended this order to include casual workers in the bargaining unit (Board order 8616-U).

[2] Prior to the Board's 2003 order, the Halifax Longshoremen's Association, ILA, Local 269 (Local 269) represented all longshoremen, foremen and walking bosses in the longshoring industry at the Port of Halifax by virtue of a certification order issued by the Canada Labour Relations Board (CLRB) in January 1988 under the geographic certification provisions of the *Code*. In that order, the longshore employers were named individually, but the Board directed the employers to appoint an agent to act on their behalf pursuant to then section 132(3) (now section 34(3)) of the *Code*. The longshore employers initially selected the Maritime Employers' Association (MEA) to represent them, but in 1996 they appointed a new agent, the Halifax Employers Association (HEA), and the Board confirmed that transfer of responsibility by order dated December 23, 1996.

[3] On January 10, 2011, the ILA Council applied to the Board for an order declaring that Wilson Fuel Co. Limited (Wilsons) was engaged in longshoring work in the Port of Halifax and was therefore subject to the port-wide geographic certification order. This application was subsequently amended, on consent, to name Barrington Terminals Limited (BT) as the employer rather than Wilsons. Although the HEA was given notice of the application, it did not seek intervenor status in the Board's proceedings.

II–Facts

[4] BT and Wilsons are sister companies. BT is in the business of bulk fuel storage. It has one employee, Mr. David Collins, P.Eng., who has been the Vice-President of BT since 1994. Mr. Collins is also the Vice-President of Wilsons, and estimates that his work on behalf of BT occupies only about 2 - 4 hours per week. All other work required by BT (for example, inventory monitoring, site inspection and maintenance) is done by contractors hired for that purpose by BT.

[5] BT operates a facility consisting of 2 large and 7 smaller fuel storage tanks located at 3617 Barrington Street in Halifax, Nova Scotia. BT stores fuels, primarily petroleum. It handles between 55 and 80 million litres of furnace oil each year. BT receives the fuel through deliveries by large tanker trucks. It stores the fuel for periods between 2 to 6 weeks and normally transfers the fuel into smaller trucks for delivery to customers.

[6] However, there is also a 200 metre pipeline extending from the BT property down a hill and under a railway line to Pier 9, which is one of several multi-use facilities at the north end of the Port of Halifax where the loading and unloading of ocean going vessels occurs. BT has used this pipeline to import petroleum by unloading it from a vessel on two occasions and to load denatured fatty acid ethyl ester (ethyl ester or the product) onto vessels on two occasions in late 2010 and once in 2011. It was the activity involving the ethyl ester in 2010 that prompted this application by the ILA Council. In all, approximately 3 million litres of ethyl ester has been loaded onto 3 vessels using Pier 9 in the year preceding the Board's hearing.

[7] Ethyl ester is a by-product of the process used by Ocean Nutrition Canada Limited (ONC), a Nova Scotia company that supplies Omega-3 EPA/DHA ingredients to the dietary supplement and food manufacturing markets. Because it can also be used as a bio-diesel, BT entered into an agreement with ONC in 2002 to purchase ethyl ester as an additive for its fuel products. BT ultimately abandoned this venture as uneconomic. However, a company unrelated to either BT or ONC, Modern By-Products Canada Ltd. (MBP), was interested in the product and in September 2010, it entered into an agreement with BT to lease a 33,000 bbl storage tank on BT's Barrington Street property for a one-year period, in order to store ethyl ester that MBP purchased from ONC. This lease was subsequently extended to December 31, 2012.

[8] Wilsons receives the fish oil from ONC and denatures it with certain additives to stabilize the product and make it unfit for human consumption. Once denatured, the product can be stored by BT for as long as a year. However, at that point, it is deemed to be a petroleum product because of its intended end use. For example, rags soaked in the denatured ethyl ester can spontaneously combust. BT therefore handles ethyl ester like any petroleum product with respect to transportation, fire measures and pollution control.

[9] BT's lease with MBP is for storage only. BT does not take ownership of the product at any time. MBP advises BT when and how the product is to be shipped out. However, in the 3 instances that are the subject of this application, MBP asked BT to make the arrangements for transporting the product from the fuel tank on Barrington Street to vessels that MBP had chartered. Accordingly, in early September 2010, BT hired a contractor to reconfigure the underground pipe from its premises to Pier 9 so that it would be bi-directional.

[10] The first vessel, the M/V Bernora, was loaded on October 16, 2010. Wilsons rented a large pump, which was placed on the brow of Pier 9, near the end of the pipe from BT's facility. BT engaged Maritime Biofuels Inc. (MBI) to oversee the loading process and contracted I.T.S. Construction Incorporated (ITS) to supply the labour and material to load the vessel. This is the same firm that reconfigured the underground pipe used to transport the product from BT's storage tank to the vessel. ITS advertises itself as a general contractor and petroleum specialist; it does not purport to be a stevedoring company. The work done by ITS for BT involved assembling a length of hose; installing a hose from the pier end of the pipe to a rented pump; connecting another hose from the pump to the vessel, using the ship's crane; checking all joints for leaks; filling the vessel; disconnecting the hose from the ship; and vacuuming out all of the hoses and pipes.

[11] The second vessel, the M/V Louise Knutsen, was loaded on December 1, 2010. Once again, Wilsons rented the pumps and had them placed on Pier 9. BT contracted with MBI to oversee the loading process. Wilsons contracted with ITS to supply the labour and material for the loading, and also to perform certain related "infrastructure" work.

[12] The third vessel, the M/V Ruby T, was loaded overnight on September 13/14, 2011. By that time, BT had determined that the pump was the area of highest risk for a leak or spill and therefore moved the rented pump up onto its property on Barrington Street, where better containment systems are in place. Once again, under contract to BT, MBI organized and supervised the loading process and ITS supplied the labour. The evidence before the Board was that far fewer men were used to effect the loading in September 2011 than had been employed on the first two occasions (2 rather than 7).

[13] According to BT, MBP still has product stored in BT's tank, but at the time of the hearing, BT was not aware of any plans to load any further vessels with ethyl ester in the near future.

III–Issues

[14] The first issue for the Board to determine is whether the work that was performed on Pier 9 on October 16, 2010, December 1, 2010 and September 13/14, 2011 is longshoring work within the scope of the geographic certification issued to the ILA Council by the CIRB.

[15] If the Board determines that the work in question is longshoring subject to the ILA Council's geographic certification, the second issue is what the appropriate remedy is for BT's failure to respect that certification order.

IV–Positions of the Parties

A–The ILA Council

[16] The applicant argues that the work that BT engaged in with respect to the loading of the three vessels clearly falls within the well recognized definition of longshoring. It agrees that BT's storage facilities are provincially regulated, but submits that, when BT opens the spigot to allow the product to flow downhill to the pier to be loaded on a vessel, it is engaged in longshoring and that this activity is completely severable from BT's provincially regulated activities.

[17] The applicant points to the decision of the Supreme Court of Canada, *Validity and Applicability of the Industrial Relations and Disputes Investigation Act*, [1955] S.C.R 529 (*Eastern Canada Stevedoring*), as authority for the proposition that the work of stevedores is an integral part of federal jurisdiction over navigation and shipping. It argues that the securing of pipelines for the loading of oil into the cargo hold for marine transportation is an integral part of marine transportation and directly related to the loading and unloading of ships engaged in marine transportation. In the applicant's submission, longshoring includes operating the pump to move the product to the pier,

connecting the hoses to the pipe and to the vessel, filling the hold of the vessel, removing, cleaning and rewinding the hoses, cleaning up the area as well as tying and untying the vessel from the pier.

[18] The applicant contends that the loading of cargo, including oil, is longshore work. It argues that the loading of ethyl ester on vessels at Pier 9 is analogous to the loading of tallow (edible oil), which is performed by longshoremen who assemble the needed hose lengths, connect them together, hook up the tank in vessel and the storage tank, observe the pumping operation to ensure that no spillage occurs, shut off the necessary valves and clean up the area if a spill occurs, and, upon completion disassemble and clean the hose-lengths (see *Halifax Longshoremen's Association, Local 269 and the Halifax Employers Association*, Darby arbitration decision, September 3, 1997).

[19] The applicant further notes that, on the occasions when the ethyl ester was loaded, union members were hired by Logistec to tie up and untie the vessels.

[20] The ILA Council asks that the geographic certification order be amended to include BT as a longshoring contractor in the Port of Halifax, retroactive to October 16, 2010.

B–Barrington Terminals

[21] BT argues that it is a bulk tank storage facility, it is not engaged in the field of marine transportation and its activities therefore do not fall within federal jurisdiction. It states that it did not do the work at issue itself and that the work that was done represents only a very small proportion of BT's activities.

[22] BT argues that its situation is analogous to that of International-Matex Tank Terminals (IMTT-Quebec), a public terminal that handled and stored liquid bulk in the Port of Quebec, which the Board found was not actively engaged in the longshoring industry in *Société des Arrimeurs de Québec Inc.*, 2005 CIRB 339.

[23] BT also relies on the Board's decision in *Bayside Port Employers Association Inc.*, 2004 CIRB 293 (*Bayside*), in which the Board found that the work of Kingsco Transport Ltd. (Kingsco), a

company that moved goods from the dock to a transformation plant, was not an essential link within the marine transport system and therefore was not engaged in longshoring. BT points out that, for most of its customers, transportation is by truck, not ship.

[24] BT submits that it had a contract with MBP to store the product received from ONC and that when MBP decided to move the product to the ships it had chartered, it asked BT for assistance. BT takes the position that it is subject to the Nova Scotia *Petroleum Management Regulations* (N.S. Reg. 44/2002) and that it was required by sections 16(3) and 17(1) of those regulations to engage a certified installer to do the work. BT contracted with MBI, who determined the best way to proceed in order to comply with the regulations. ITS was contracted to do the work because of its familiarity with the BT site and operations and the fact that it has certified installers on staff. BT argues that, as the contractor, it was not engaged in longshoring. In this regard, BT relies on the Board's decision in *Services Maritimes Québec Inc.*, 2006 CIRB 371, in which the Board stated:

> [75] Thus, if a company can transport its goods by ship and if those goods must be loaded and unloaded, in all likelihood, longshoring activities will be carried out along the way. The fact that a subcontractor loads and unloads the goods and is actively engaged in the longshoring industry does not make the client business an employer actively engaged in the longshoring industry. In such a case, the subcontractor, not the client business, should probably be covered by the geographic certification order for that area.

[25] BT maintains that a special skill set is required to handle ethyl ester, and contends that ILA Council members do not have the necessary skills and certification to deal with this product. It argues that the tallow that the union members handle can be distinguished on the basis of the type of product, since tallow is significantly different from ethyl ester and does not pose the same hazards and risks. BT contends that it was justified in contracting with ITS because the latter has certified installers.

[26] BT argues that the work was not severable from its other operations, so as to place the employer within the jurisdiction of the *Code*. It argues that the fact it did this work without ILA labour does not pose a threat to labour relations stability in the Port, as the work constitutes a specialized, discrete business that does not happen often. It argues that it should be allowed to have the work performed in the most cost efficient manner.

[27] BT asks that the ILA Council's application be dismissed.

C–ILA Council reply

[28] The ILA Council distinguishes the *Société des Arrimeurs de Québec Inc.* case, *supra*, relied on by BT, on the basis that IMTT unloaded liquid bulk cargo directly into a silo using a narrow pipe and therefore did not require the many intermediary steps present in this case, which the union contends constitute longshoring. The ILA Council therefore argues that BT's situation is not analogous to that of IMTT.

[29] The applicant states that if the work that was done constitutes longshoring, then it is longshoring regardless of who does the work or whom it is done for. Therefore, when BT contracted ITS to do the work necessary to load MBP's product on a vessel, BT was involved in longshoring. The ILA Council also noted that, when it had originally named Wilsons as the employer, Wilsons indicated that BT was the proper respondent.

[30] The ILA Council also argues that there is no regulation requiring that persons engaged in loading ethyl ester must be certified, as BT contends. It points out that there was no installation or alteration going on at the time the product was loaded on the vessel, and the only obligation under the Nova Scotia *Petroleum Management Regulations* is that found in section 9, namely that the transfer be supervised and that there be an ability to shut off the flow.

[31] The applicant states that the labour relations harm that may be done if BT is allowed to engage in longshoring work without being subject to the geographic certification order is that anyone would be able to claim that their product was "special" and therefore not subject to the geographic certification.

V–Analysis and Decision

[32] In *Eastern Canada Stevedoring*, Estey J. stated:

> That the work of the stevedores is an integral part would seem to follow from the fact that these lines of steam ships are engaged in the transportation of freight and the loading and unloading thereof, which would appear to be as necessary to the successful operation thereof as the enbussing and debussing of passengers in the *Winner* case, supra. The loading would, therefore, be an integral part of the operation of these lines of steam ships and, therefore, subject to the legislative jurisdiction of Parliament.
>
> The foregoing is founded upon the construction of the *B.N.A. Act*. The fact that under other statutes stevedores have not always been regarded as seamen and have not always had a lien upon the ship for their wages does not in any way detract from the foregoing. However, history does assist to this extent–that the loading and unloading of ships have always been regarded as the duty and responsibility of the owner or charterer and to this extent it is of assistance in holding that **the work of unloading and loading is an essential part of the transportation of freight in vessels**. *Lewis on Shipping*; *Busby v. Winchester*... The fact that a portion of the stevedores' work is on land as well as on the ship does not detract from the foregoing because that which is done on land is as essential a part as that on the ship in respect to loading and unloading.
>
> (emphasis added)
>
> (pages 568 and 569)

[33] BT is not in a similar situation to that of IMTT, as described by the Board in *Société des Arrimeurs de Québec Inc., supra*. In that case, IMTT used its own employees to unload liquid bulk cargo from a ship directly into its storage tanks, using an existing pipe. The Board found that the single task of connecting the pipe from the ship to a storage tank located on the dock was incidental to IMTT's primary activity of storage and that IMTT was not covered by the geographic certification. In this case, there was considerably more activity required than merely connecting an existing pipe to the vessel. The hoses had to be assembled, connected to the pipe from the storage tank on BT's property and to the vessel; the flow had to be monitored and the hoses and pipes cleaned after the operation had concluded. In this case, the additional activities that were undertaken at BT's direction in order to effect the loading of the ethyl ester onto the vessels clearly constitute longshoring.

[34] In the *Bayside* case, the union had agreed to exclude certain bulk cargoes (gypsum or gypsum substitutes, sand and rock) from the scope of a geographic certification order issued in 1997. In 2003, the union sought to amend the order to include longshoring work related to the handling of bulk cargoes. Although the Board extended the scope of the geographic certification order to include bulk

cargo, it found that the activities of one company, Kingsco, did not constitute longshoring, because that work was not integrated into a continuing marine operation. Specifically, gypsum owned by Westroc Inc. was unloaded from a self-unloading vessel onto the dock and over the course of the two to three weeks following the unloading, Kingsco transported the gypsum from the dock to a transformation plant some distance away. Under those circumstances, the Board found that transporting the gypsum by truck was not an integral part of marine transportation and Kingsco was therefore not involved in longshoring. Kingsco's work was not related to the loading and unloading of the ship, but to the final destination of an already unloaded product. Kingsco's activities are clearly distinguishable from those of BT, which only transported the ethyl ester to the dock at the time that the vessel was ready to be loaded. As the transportation of the product from the storage tank at that particular point in time was clearly related to the loading of the ship, it is therefore part of marine transportation.

[35] The facts in this case are more analogous to those at issue in *Maritime Employers Association*, 2011 CIRB 581. In that case, Waterford Crushing and Screening Ltd. (Waterford) was one of several companies working under contract to US Steel in Hamilton, Ontario. When notified that there was a ship to be loaded, Waterford used its own employees, who were not ILA members, to operate front end loaders under the supervision of a Waterford foreman, for the purpose of transporting aggregate from a stockpile on or near the dock to the bottom of a conveyor and to feed it into a hopper attached to a conveyor. Waterford also supplied the conveyor and an employee to operate it under contract to Great Lakes Stevedoring Ltd. (GLS). The product was transported by the conveyor up onto the ship, where GLS used two ILA members to load it into the vessel through the ship's hatches. All of the work was directed by GLS.

[36] In coming to the conclusion that Waterford was engaged in longshoring, the Board stated:

> [23] The basis for federal jurisdiction over longshoring was thoroughly canvassed by the Board in the case of *Société des Arrimeurs de Québec Inc.*, 2009 CIRB 451, at paragraphs 199 to 211. Briefly, federal jurisdiction over longshoring does not exist as a result of an independent head of federal power, but because the activity is necessarily ancillary to marine transportation (see *Validity and Applicability of the Industrial Relations and Disputes Investigation Act*, [1955] S.C.R. 529). While it is generally agreed that longshoring consists of the loading and unloading of ships, there has been considerable jurisprudence generated as to where those activities begin and end. The Federal Court of Appeal provided some guidance on this subject in *Cargill Grain Co., Gagnon and Boucher Division* v. *International Longshoremen's Assn., Local 1739* [1983] F.C.J. No. 948:

> 26 ...Because operations of sorting, handling and storing goods can be an incidental part of transport by sea, it does not follow that all operations of sorting, handling and storing goods, even on a wharf, are necessarily a part of such transport. **In my view, operations of this type are an incidental part of longshoring, and as such connected with the transport itself, when they are actually necessary in order to complete the transport operation and ensure that the goods are delivered to their recipient**.
> ...
>
> (emphasis added)

> [24] Applying this test, the Board can only find that the pickup of materials from a stockpile and the transportation and unloading of those materials into a hopper that is connected to a conveyor which transports the materials onto the ship, for eventual delivery to their intended recipient, is part of a continuum that is not only necessary but essential to complete the marine transportation operation. As a result, the Board finds that, to the extent that Waterford performs these activities on the US Steel Canada site, it is engaged in longshoring activities within the meaning of the *Code*.

[37] On the facts of the instant case, the Board finds that the loading of ethyl ester from BT's storage tanks onto vessels at Pier 9, which took place at BT's direction on October 16, 2010, December 1, 2010 and September 13/14, 2011, was longshoring work. The work does not become something other than longshoring simply because of the nature of the product or because it was performed by a subcontractor who does not ordinarily engage in longshoring.

[38] Although the Board has found that the work in question is longshoring work, and therefore is subject to the ILA Council's geographic certification, it does not necessarily follow that BT is in the longshoring business and is obliged to become a member of the HEA. The evidence presented to the Board was that BT did not carry out the work itself, but hired subcontractors to perform the necessary activities. BT's error was in hiring a subcontractor that is not a member of the HEA to perform the longshoring work that is subject to the ILA Council's geographic certification.

[39] There may be merit in BT's argument that the Nova Scotia *Petroleum Management Regulations* required it to engage a certified installer to reconfigure the pipe to be bidirectional in early September 2010, and to perform the other "infrastructure" work that was done in December 2010. However, as the ILA Council points out, there was no installation or alteration going on at the time of the loading of the vessel. Although the ITS employees who performed the installation work may have had the skills required to connect the hoses, this does not mean that they are entitled to perform longshoring work that is covered by the union's geographic certification.

[40] The Board finds no merit in BT's argument that ILA Council members are not qualified to perform the loading of the ethyl ester onto vessels. There is no evidence that BT made any inquiries of the HEA or any of its member companies before hiring ITS to do the work that the Board has found is longshoring. However, even if the Board is wrong in its view of the regulatory requirements, it was open to BT to hire a certified installer to supervise the process carried out by the longshoremen, just as it hired MBI to advise it on the loading process. To ensure that there is no confusion in the future, the Board suggests that the ILA Council work with the HEA to determine whether any particular qualification or certification is required to deal with this product and, if so, to ensure that adequate numbers of ILA Council members have the necessary qualifications to do the work.

[41] The Board directs that, in the event that BT involves itself in the loading of this or any other petroleum product onto vessels in future, it is to employ the services of longshoremen working for a member company of the HEA and therefore subject to the ILA Council's geographic certification for the Port of Halifax. The Board declines to issue any retroactive remedy for the breach of the union's geographic certification order, as no evidence was presented establishing that any damages were incurred by the union or its members as a result of the breach.

[42] This is a unanimous decision of the Board.

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Elizabeth MacPherson
Chairperson

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Daniel Charbonneau
Member

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André Lecavalier
Member